

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

This matter is before the Court on Defendant Angel Verdusco-Villa's Motion to Dismiss Count Five of the Superseding Indictment (#49), filed on May 16, 2014. The Court also considered the Government's Response (#52), filed on May 30, 2014.

BACKGROUND

On April 8, 2014, a Federal Grand Jury returned a superseding criminal indictment charging Defendant Angel Verdusco-Villa (“Verdusco-Villa”) with Conspiracy to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), and 21 U.S.C. § 846(b)(1)(A), Distribution of Methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), Possession with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A); and Use of a Weapon in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and (iii).¹ (Superseding Indict. #39.) Count Five specifically alleges that Verdusco-Villa and co-defendant Fasuto Quezada (“Quezada”) knowingly carried a firearm during and in relation to a drug trafficking crime on or about November 20, 2013.

By way of this motion, Verduco-Villa requests that the Court dismiss Count Five of the Superseding Indictment (#39) claiming that the evidence is not sufficient to constitute a violation of

¹ The Superseding Indictment (#39) also charges Fausto Quezada and Ruben Dario Pedro (“Pedro”) as co-defendants.

1 18 U.S.C. § 924(c). Verdusco-Villa alleges that the evidence shows that when he and Quezada
 2 were arrested on November 20, 2013, Quezada was observed conducting a drug transaction and
 3 possessing a Glock handgun. Further, Verdusco-Villa represents that he was in a different vehicle
 4 in the same parking lot and was apprehended when he attempted to leave. Also, Verdusco-Villa
 5 notes he was not found to be in possession of drugs or weapons. Verdusco-Villa highlights the
 6 Complaint (#1) that states that Quezada told the police that the gun was going to be either sold or
 7 given to the undercover police officer who purchased the drugs from Quezada. As a result,
 8 Verdusco-Villa argues that the weapon was not possessed to further the drug sale, but rather was
 9 merely being offered for sale. So, Verdusco-Villa requests that Count Five be dismissed because
 10 the evidence does not show that the weapon be used or carried in furtherance of the crime of
 11 violence or drug crime, as required by 18 U.S.C. § 924(c).

12 In response, the Government contends that Verdusco-Villa has failed to demonstrate that
 13 Count Five is capable of determination without trial of the general issue. It notes that Verdusco-
 14 Villa's does not challenge the facial validity of the indictment based on accepting the facts alleged
 15 as true. Instead, the Government argues that Verdusco-Villa's argument regarding how the gun
 16 was used should have been bought as a motion for acquittal under Federal Rule of Criminal
 17 Procedure 29. As a result of this procedural defect, the Government claims that Count Five is not
 18 subject to dismissal.

19 DISCUSSION

20 I. Rule 12(b) Motion to Dismiss

21 Federal Rule of Criminal Procedure 12(b) provides that “[a]ny defense, objection, or request
 22 that the court can determine without trial of the general issue” may be raised by pretrial motion. A
 23 motion to dismiss is generally capable of determination before trial “if it involves questions of law
 24 rather than fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir.), cert.
 25 denied, 478 U.S. 1007 (1986)). Generally, Rule 12(b) motions are appropriate to consider “such
 26 matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity,
 27 [and] lack of jurisdiction.” *United States v. Smith*, 866 F.2d 1092, 1096 n. 3 (9th Cir. 1989). A
 28 motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence.

1 *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996). The Ninth Circuit has held that the
 2 ultimate finder of fact is concerned with the general issue of guilt. *Id.* So, a motion requiring a
 3 factual determination may be decided before trial if it is not “substantially founded upon and
 4 intertwined with evidence concerning the alleged offense.” *Id.*

5 Here, Verduesco-Villa claims that Count Five is subject to dismissal because he did not
 6 possess a firearm and the firearm was not used “in furtherance” of the alleged drug crime as
 7 required by 18 U.S.C. § 924(c). Section 924(c) provides, in relevant part:

8 [A]ny person who, during and in relation to any crime of violence or drug trafficking
 9 crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a
 10 firearm, shall, in addition to the punishment provided for such crime of violence or drug
 11 trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years.

12 The Court finds that Verduesco-Villa’s argument is not a question of law, but rather a factual
 13 question as to whether the weapon was used or carried in furtherance of a crime of violence or drug
 14 crime. He refers to a statement by Quezada that Quezada was arrested with possession of the
 15 firearm to establish the insufficiency of Count Five. However, Verduesco-Villa acknowledges that
 16 the statement is hearsay and therefore, may not be admitted as evidence at trial. Further, if the
 17 firearm was used to further drug activity or, instead, was offered for sale is a factual determination
 18 that must be deferred to the jury. Accordingly, the Court will recommend denying Verduesco-
 19 Villa’s motion because it requires a determination substantially founded upon the evidence
 20 considering the alleged offense.

II. Sufficiency of Indictment

21 An indictment is sufficient if it has the following: (1) contains the elements of the offense
 22 charged and fairly informs a defendant of the charge against which he must defend and (2) enables
 23 a defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense.

24 See *Hamling et al. v. United States*, 418 U.S. 87, 117 (1974). When considering a motion to
 25 dismiss, the allegations of the indictment are presumed to be true. *Id.* The indictment itself should
 26 be “(1) read as a whole; (2) read to include facts which are necessarily implied; and (3) construed
 27 according to common sense.” *Id.* at 899. Accordingly, the Court’s inquiry focuses on the face of
 28 the indictment taking the alleged facts as true. The sufficiency of an indictment is not judged by

1 "whether the Government can prove its case." *United States v. Buckley*, 689 F.2d 893, 897 (9th
2 Cir. 1982). As such, arguments directed at the merits of the claims must be left for trial.

3 Count Five follows the wording of Section 924(c) and alleges that Verduesco-Villa did
4 knowingly carry a firearm during and in relation to a drug trafficking crime. It appears that,
5 through the receipt of the original complaint, Verduesco-Villa is informed of the details that form
6 the basis for the accusation so as to enable him to prepare his defense and to plead the judgment in
7 bar of any further prosecutions for the same offense. *Cooper v. United States*, 282 F.2d 527, 531
8 (9th Cir. 1960). Accordingly, the Court will recommend denying Verduesco-Villa's motion because
9 he is aware of the elements of the offense and a double jeopardy concern could be alleviated by the
10 wording of Count Five.

11 Based on the foregoing and good cause appearing therefore,

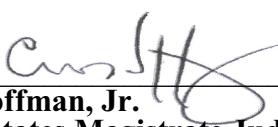
12 **RECOMMENDATION**

13 **IT IS HEREBY RECOMMENDED** that Defendant Angel Verduesco-Villa's Motion to
14 Dismiss Count Five of the Superseding Indictment (#49) be **denied**.

15 **NOTICE**

16 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
17 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
18 held that the courts of appeal may determine that an appeal has been waived due to the failure to
19 file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit
20 has also held that (1) failure to file objections within the specified time and (2) failure to properly
21 address and brief the objectionable issues waives the right to appeal the District Court's order
22 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,
23 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

24 DATED this 19th day of June, 2014.

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26 
27 **C.W. Hoffman, Jr.**
28 **United States Magistrate Judge**